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March 1, 1996

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William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

Re: Revision of Part 22 and
Part 90 of the Commission's
Rules to Facilitate Future
Development of Paging Systems
WT Docket No. 96-18
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith on behalf of TSR Paging Inc. are one (1) original paper, nine (9) paper copies, one (1) silver master microfiche, and two (2) diazo duplicate microfiche copies of Comments with respect to the Interim Licensing Proposal included in the Notice Of Proposed Rulemaking released by the Commission on February 9, 1996, in the above-captioned proceeding.

Should you have any questions with respect to this matter, please communicate directly with this office.

Sincerely,

Richard S. Becker

Richard S. Becker
Attorney for TSR Paging Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Revision of Part 22 and)
Part 90 of the Commission's)
Rules to Facilitate Future)
Development of Paging Systems)
)
Implementation of Section)
309(j) of the Communications)
Act -- Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

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COMMENTS

Respectfully submitted,

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Date: March 1, 1996

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SUMMARY

By these comments, TSR Paging Inc. ("TPI") comments on the Interim Licensing Proposal adopted by the Commission in its Notice Of Proposed Rulemaking ("NPRM") in the above-captioned rulemaking proceeding.

TPI currently provides wide-area, common carrier paging ("CCP") and private paging ("PCP") service in numerous states. TPI is also licensed for a "Phase II" nationwide exclusive paging system on the PCP Channel 929.2125 MHz and TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization granted to TPI by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496. As a multi-state, wide-area CCP and PCP paging carrier, TPI is extremely interested in the proposals set forth in the NPRM, including the Commission's Interim Licensing Proposal.

With respect to the freeze imposed by the Commission on acceptance of new CCP and PCP applications, TPI believes that the Commission must act as rapidly as possible on the proposals specified in the NPRM so that the adverse effects of the freeze adopted as part of the Interim Licensing Proposal will be minimized.

With respect to the exemptions to the freeze identified in the NPRM, TPI specifically supports the exemption to the freeze adopted by the Commission for new and/or modified co-channel transmitter sites whose interference contour(s) are encompassed by the composite interference contour(s) of incumbents' CCP and PCP systems. TPI also supports the Commission's decision to allow Part 22 incumbents to permissibly add and/or modify their systems in a way that increases the existing service contours as long as the incumbent's composite interference contour is not expanded. TPI requests, however, that the Commission clarify the procedures by which Part 90 PCP licensees may permissibly add and/or modify sites whose interference contours do not extend existing interference contours. Specifically, TPI submits that the Commission must clarify paragraph 141 of the NPRM to specify for Part 90 PCP operations provisions similar to those embodied in Part 22 of the Commission's Rules, including an exemption from the prior frequency coordination requirements of Section 90.175 of the Commission's Rules.

In addition, TPI believes that TPI must be considered a licensee of a PCP nationwide exclusive system on 929.2125 MHz, who is permitted to install additional co-channel transmitter sites without restrictions pursuant to the exception to the freeze specified at paragraph 142 of the NPRM. As a "Phase II" nationwide exclusive licensee that is completing construction of its system pursuant to extended implementation authorized by the Commission,

TPI believes that it has been granted nationwide exclusivity pursuant to Section 90.495 of the Commission's Rules and that TPI should be eligible for the nationwide exception to the freeze just like "grandfathered" nationwide exclusive PCP licensees.

TPI opposes the Commission's proposal to permit secondary licensing of non-"internal" paging transmitters. TPI believes that the slight advantages that might be obtained by permitting secondary licensing during the (hopefully) brief freeze are far outweighed by the reduction in value of geographic paging licenses and the potential service disruptions that are likely to occur when geographic licensees force incumbent secondary licensees to terminate operations.

With respect to that portion of the Interim Licensing Proposal regarding processing of currently pending CCP and PCP applications, TPI once again believes that the Commission must act as rapidly as possible on the proposals specified in the NPRM so that the adverse effects of the interim application processing procedures adopted by the Commission will be minimized.

With respect to 931 MHz application processing procedures specified at paragraph 145 of the NPRM, TPI respectfully submits that before the Commission can properly implement its proposed geographic licensing of 931 MHz CCP Channels, the Commission must first address the outstanding appeals surrounding incumbent 931 MHz CCP systems that have been operating for several years.

TPI also believes that the Commission's statement at paragraph 148 of the NPRM that the Commission will postpone consideration of "numerous requests for conditional and permanent exclusivity [that] are pending before the Commission": (i) is inconsistent with current Section 90.495 of the Commission's Rules, which grants exclusivity upon licensing by the Commission; and (ii) does not apply to entities such as TPI that have already been licensed for Phase II nationwide exclusive systems pursuant to PCIA coordination. Moreover, the Commission's statement at paragraph 148 that "[i]n the event that we adopt our proposals for geographic area licensing, all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot" does not make sense in the context of Phase II nationwide PCP exclusivity. Specifically, Phase II nationwide exclusive licensees such as TPI will not be fully protected by the incumbent status of only those transmitters licensed as of the February 8, 1996, adoption date of the NPRM.

TPI submits these Comments with respect to the Interim Licensing Proposal included in the NPRM in the above-captioned proceeding. TPI intends to submit further comments by the appropriate filing date with respect to the remaining Commission proposals identified in the NPRM.

Before the
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To: The Commission

COMMENTS

TSR Paging Inc. ("TPI"), by its attorneys and pursuant to 47 C.F.R. §1.415, hereby submits these Comments in response to the Interim Licensing Proposal adopted by the Commission in its Notice Of Proposed Rulemaking¹ in the above-captioned rulemaking proceeding.² In support of these Comments, the following is respectfully shown.

I. Introduction

1. In the NPRM, the Commission proposed extensive revisions to its regulation of common carrier paging ("CCP") services

¹Notice Of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52, ¶¶139-149 (February 9, 1996) (hereinafter "NPRM").

²As specified at paragraph 153 of the NPRM, TPI is filing the instant Comments only with respect to the Interim Licensing Proposed adopted by the Commission at paragraphs 139-149 of the NPRM. TPI is currently reviewing the remaining proposals specified in the NPRM and TPI anticipates that it will submit additional comments with respect to these proposals by the filing deadline for such comments, which the Commission has currently set at March 18, 1996.

pursuant to Part 22 of the Commission's Rules³ and private paging ("PCP") services pursuant to Part 90 of the Commission's Rules.⁴ Specifically, the Commission proposed to move from the current site-specific regulatory approach to a geographic licensing approach where the Commission will issue single licenses for geographic areas that encompass many sites.⁵ The Commission also proposed to adopt competitive bidding rules for mutually-exclusive ("MX") applications for geographic paging licenses.⁶

2. In addition to its geographic licensing and competitive bidding proposals, the Commission also adopted an Interim Licensing Proposal, which included numerous provisions regarding Commission acceptance and processing of applications for both CCP and PCP Channels during the pendency of the proceeding initiated by adoption of the NPRM.⁷ The Interim Licensing Proposal included the following provisions:

- A freeze on acceptance of new applications for paging channels as of the February 8, 1996, adoption date of the

³The Commission pointed out that Part 22 CCP channels include 35, 43, 152, 158, 152/158, 454/459 and 931 MHz channels used for paging service. NPRM at ¶3. These channels will be referred to collectively hereinafter as "CCP Channels."

⁴The Commission pointed out that Part 90 PCP channels include 152/158, 462, 465 and 929 MHz channels used for paging service. NPRM at ¶3. These channels will be referred to collectively hereinafter as "PCP Channels."

⁵NPRM at ¶1.

⁶Id.

⁷Id. at ¶¶139-149.

NPRM.⁸

- Exception from the freeze for assignment of license and transfer of control applications.⁹
- Exception from the freeze to allow incumbent CCP and PCP licensees to add co-channel transmitter sites and/or modify existing transmitter sites if the interference contour(s) of the new or modified transmitter sites do not expand the composite interference contour of the incumbent's existing system.¹⁰
- For CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel, the Commission permitted applications for additional sites without restrictions.¹¹
- The Commission proposed allowing incumbents to file new applications to expand or modify their existing systems beyond existing interference contours with such additions and modifications receiving only secondary authorization.¹²
- With respect to processing of currently pending CCP and PCP applications, the Commission basically proposed to process any such applications that are not MX and for which the period for filing competing applications had expired as of the adoption date of the NPRM.¹³
- The Commission also indicated that it would postpone consideration of pending requests for conditional and permanent exclusivity on 929 MHz PCP Channels while the instant proceeding is pending.¹⁴

⁸Id. at ¶139. Although not entirely clear from the text of the NPRM, TPI has been informally advised by the Commission and PCP Channel frequency coordinator, the Personal Communications Industry Association ("PCIA"), that the freeze applies to all CCP and PCP Channels.

⁹Id.

¹⁰Id. at ¶¶140, 141.

¹¹Id. at ¶142.

¹²Id. at ¶143.

¹³Id. at ¶¶144-149.

¹⁴Id. at ¶148.

The Commission established March 1, 1996, as the comment deadline for the Interim Licensing Proposal and March 18, 1996, as the comment deadline for the remainder of the proposals specified in the NPRM. By these Comments, TPI addresses the Commission's Interim Licensing Proposal.

II. The Interest Of TPI

3. TPI is a communications company primarily engaged in the provision of one-way paging services. TPI currently provides wide-area, one-way paging service in numerous states, including New York, Connecticut, Rhode Island, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, the District of Columbia, Texas, New Mexico, Arizona, Nevada and California. TPI provides one-way paging service on both CCP Channels and 929 MHz PCP Channels. In point of fact, TPI is now licensed for a nationwide exclusive paging system on the PCP Channel 929.2125 MHz¹⁵ and TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization granted to TPI by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496.¹⁶ As a multi-state, wide-area CCP and PCP paging carrier, TPI is extremely interested in the proposals set forth in the NPRM, including the Commission's Interim Licensing Proposal.

¹⁵See, e.g., Station WPGD 501, File No. 674235. This system will be referred to hereinafter as the "TPI Nationwide System."

¹⁶See Commission Letter 7110-162 dated December 1, 1995.

III. Paging Application Freeze

4. As an operator of large, multi-state CCP and PCP paging systems, it is vital that TPI retain the operational flexibility to add, modify and delete paging transmitters as quickly and efficiently as possible. This is particularly true in the case of the TPI Nationwide System, where TPI is currently engaged in extensive construction to complete installation of this system. TPI recognizes the Commission's need to impose the freeze on acceptance of new CCP and PCP paging applications during the pendency of the proceeding initiated by adoption of the NPRM. TPI respectfully submits, however, that the Commission must act as rapidly as possible on the proposals specified in the NPRM so that the adverse effects of the freeze adopted as part of the Interim Licensing Proposal will be minimized. If the Commission maintains the freeze for more than a few months, even with the exceptions to the freeze discussed below, TPI's ability to continue its explosive growth and system expansion will be greatly obstructed.

IV. Exemptions To The Freeze

A. "Internal" Transmitter Sites

5. TPI specifically supports the exemption to the freeze adopted by the Commission for new and/or modified co-channel transmitter sites whose interference contour(s) are encompassed by the composite interference contour(s) of incumbents' CCP and PCP systems. TPI believes that a large portion of its construction efforts will meet this exemption and will, therefore, be permitted regardless of the freeze. To the extent that this occurs, the

adverse effects of the freeze on TPI's flexibility to expand its existing CCP and PCP systems will be reduced.

6. TPI also supports the Commission's decision to allow Part 22 incumbents to permissibly add and/or modify their systems in a way that increases the existing service contours as long as the incumbent's composite interference contour is not expanded.¹⁷ TPI believes that the Commission's action will increase the scope of this exception to the freeze and thereby enhance the flexibility of incumbent Part 22 CCP carriers like TPI to modify their systems to meet subscriber and public demands for service.

7. With respect to this exception, however, TPI requests Commission clarification as to the procedures by which Part 90 PCP licensees may permissibly add and/or modify sites whose interference contours do not extend existing interference contours. Specifically, under Part 22 of the Commission's Rules, CCP licensees may add or modify sites in these circumstances without any prior Commission approval or notification.¹⁸ A CCP licensee may also opt to submit an FCC Form 489 notification to the Commission advising of the addition or modification in order to obtain interference protection for such facilities.¹⁹ Under Part

¹⁷NPRM at ¶140.

¹⁸47 C.F.R. §§22.123, 22.163, 22.165. A licensee is only required to make a record of the "pertinent technical and administrative information" regarding the new or modified facilities and make that information available to the Commission upon request. 47 C.F.R. §§22.163(d), 22.165(i).

¹⁹47 C.F.R. §22.352(c)(6). As noted above, these regulations currently apply only to additions or modifications that do not enlarge existing service and interference contours. Even though

90 of the Commission's Rules, however, there are no such provisions for installation of "internal" co-channel sites and/or modifications. Specifically, Part 90 currently requires that any new PCP transmitter site and most significant modifications to existing PCP transmitter sites must be authorized by: (i) submission of an FCC Form 600 application to frequency coordinator, PCIA; (ii) coordination of that application by PCIA; and (iii) submission of the application to the Commission and grant of the application by the Commission.²⁰ There are no specific provisions for installation and operation "internal" transmitter sites whose interference contours do not extend existing interference contours.

8. In light of this discrepancy, TPI respectfully submits that the Commission must clarify paragraph 141 of the NPRM to specify the procedures by which incumbent PCP licensees may add and/or modify transmitters whose interference contours do not extend the incumbent's existing co-channel interference contours. TPI believes that in the interest of regulatory parity, the Commission should find that provisions similar to those embodied in

the Commission decided at paragraph 140 of the NPRM to exempt incumbent CCP licensees from the service contour limitation, TPI assumes that incumbent Part 22 CCP licensees would still follow these regulations for addition or modification of sites that meet the remaining interference contour limitation.

²⁰47 C.F.R. §§90.135(a), 90.135(c), 90.175. Section 90.159 of the Commission's Rules does allow installation and operation of new and/or modified PCP transmitters on a conditional basis pending grant of the required underlying FCC Form 600 application, but such conditional operation may only begin upon coordination of the underlying application by PCIA and such operation is conditioned upon Commission action on the underlying FCC Form 600 application. 47 C.F.R. §90.159.

Part 22 of the Commission's Rules should be extended to Part 90 licensees so that an incumbent Part 90 licensee can install such new or modified transmitter sites: (i) without any notification whatsoever to the Commission, as long as the licensee retains "pertinent technical and administrative information" and makes that information available to the Commission; or (ii) if the licensee wishes to obtain interference protection for the new or modified site, the licensee may submit an FCC Form 489 notification to the Commission advising of the new or modified facilities. Moreover, TPI respectfully submits that because these sites are "internal" sites, it is not necessary to obtain prior frequency coordination by PCIA for these additions or modifications.²¹ TPI believes that clarification of the procedures relating to installation of Part 90 PCP transmitters that are exempt from the freeze because their interference contours do not extend existing interference contours will provide carriers with certainty as to how to take maximum advantage of the flexibility that the Commission has attempted to build into its freeze on acceptance of new paging applications.

B. Nationwide Exclusive PCP Frequencies

9. In its Interim Licensing Proposal, the Commission exempted from its freeze CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel.²² These licensees will be allowed to submit applications for additional sites without

²¹At most, the Commission may wish to require that PCP licensees notify PCIA of installation of the new or modified facilities using a Form 489 application.

²²NPRM at ¶142.

restrictions.²³ The Commission did not, however, make clear whether this exception applied only to "grandfathered" nationwide exclusive PCP licensees as listed in a May 27, 1994, Commission Public Notice,²⁴ or whether this exception also applies to "Phase II" nationwide exclusive PCP licensees like TPI, whose nationwide paging systems have been recognized as qualifying for nationwide exclusivity by PCIA and who have been licensed for a nationwide system by the Commission, but whose nationwide exclusivity has never been explicitly recognized by the Commission in a Public Notice like the May 27 PN and who are continuing to construct their nationwide systems within applicable Commission construction deadlines.²⁵

10. In this regard, TPI must note that Section 90.495(c) of the Commission's Rules specifically provides that:

A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.

47 C.F.R. §90.495(c).

Accordingly, it is clear that upon grant of TPI's initial licenses

²³Id.

²⁴Public Notice, "Private Radio Bureau Announces 929-930 MHz Paging Operators Qualifying for Local, Regional, and Nationwide Exclusivity," DA 94-546 (May 27, 1994) (hereinafter "May 27 PN").

²⁵As specified above, TPI is completing construction of the TPI Nationwide System on 929.2125 MHz pursuant to an extended implementation authorization issued by the Commission pursuant to 47 C.F.R. §90.496 on December 1, 1995.

for the TPI Nationwide System, TPI was granted nationwide exclusivity on PCP frequency 929.2125 MHz. This grant of exclusivity occurred by operation of Section 90.495(c) of the Commission's Rules regardless of the fact that the Commission has not issued a second Public Notice similar to the May 27 PN that confirms TPI's "Phase II" exclusivity grant.

11. TPI must also emphasize that Section 90.495(b) of the Commission's Rules provides protection from future co-channel licensing as soon as a PCP applicant "qualifies for exclusivity under paragraph (a) of this section."²⁶ Accordingly, once TPI qualified for nationwide exclusivity on 929.2125 MHz as confirmed by PCIA's coordination of TPI's applications for the TPI Nationwide System, no further 929.2125 MHz authorizations could be coordinated by PCIA or authorized by the Commission.

12. Finally, TPI must emphasize that Section 90.495(c) of the Commission's Rules does not limit or otherwise reduce the exclusivity granted "at the time of initial licensing" based on the status of an exclusive PCP licensee's construction efforts. Rather, Section 90.495(c) provides that the exclusivity granted "at the time of initial licensing" "will expire" if the system is not timely constructed. As set forth above, TPI is currently in the process of completing construction of the TPI Nationwide System in

²⁶47 C.F.R. §90.495(b). For nationwide exclusive systems, Section 90.495(b)(3) goes on to provide that "[n]o co-channel authorization will be granted in the continental United States, Alaska, Hawaii, or Puerto Rico on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section." 47 C.F.R. §90.495(b)(3).

accordance with the extended implementation schedule granted by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496. TPI respectfully submits that the pendency of its construction efforts does not limit the exclusivity granted upon TPI's initial licensing as specified in 47 C.F.R. §90.495(c).

13. In light of these facts, TPI respectfully submits that TPI must be considered a licensee of a PCP nationwide exclusive system on 929.2125 MHz. As such, TPI believes that it should be permitted to install additional co-channel transmitter sites without restrictions pursuant to the exception to the freeze specified at paragraph 142 of the NPRM. As specified above, no other entities may now apply for 929.2125 MHz facilities nationwide pursuant to 47 C.F.R. §90.495(b). Moreover, TPI believes that 929.2125 MHz must be considered one of the nationwide paging frequencies that will not be subject to geographic licensing as proposed by the Commission in the NPRM.²⁷ Accordingly, TPI

²⁷The Commission's proposal regarding geographic licensing of nationwide 931 and 929 MHz channels was set forth at paragraphs 26 and 27 of the NPRM. The Commission proposed:

[T]o exclude from our [geographic licensing] plan those channels that already have been assigned to single licensees on a nationwide basis under our existing rules. We propose to exclude ... all PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the adoption date of [the NPRM]. We will announce, by Public Notice, the specific PCP channels exclusive for nationwide use at a later time.

NPRM at ¶26.

TPI intends to comment on this proposal by the Commission in its comments to be filed by March 18, 1996. TPI will demonstrate that based on the above-specified regulations and the nationwide

respectfully submits that the Commission confirm that the exception to the freeze on filing of paging applications adopted at paragraph 142 of the NPRM applies to the TPI Nationwide System on 929.2125 MHz.

C. Secondary Licensing

14. At paragraph 143 of the NPRM, the Commission requested comment as to whether incumbent licensees should be permitted to expand or modify their systems exempt from the freeze beyond their existing interference contours.²⁸ The Commission proposed that under this alternative, such new or modified facilities would be licensed on a secondary basis only.²⁹

15. TPI opposes the Commission's proposal to permit secondary licensing of non-"internal" paging transmitters. TPI believes that such secondary licensing will significantly degrade the value of geographic paging licenses by forcing geographic licensees to contend with such secondary licensees upon issuance of the geographic license. Even though these authorizations may be secondary in nature, the secondary incumbent licensee will most likely be using the transmitters to provide service to the public and any action by the geographic licensee to force the secondary licensee to terminate operation of the secondary transmitter

exclusivity that has already been granted to TPI despite the absence of a "Phase II" exclusivity Public Notice like the May 27 PN, TPI's frequency 929.2125 MHz must be considered one of the nationwide frequencies that will be exempt from geographic licensing.

²⁸NPRM at ¶143.

²⁹Id.

site(s) will necessarily result in a reduction in service to subscribers who had come to expect service on the secondary transmitting facilities. No matter how much forewarning is given by the Commission to secondary licensees, the service disruptions that will inevitably occur where the geographic licensees are different than the secondary, incumbent licensees will diminish the value of the geographic license and result in significant disruption of service to subscribers on the incumbents' systems.

16. TPI must also point out that in these Comments, TPI is requesting that the Commission take all actions necessary to rapidly complete the rulemaking initiated by the NPRM in order to minimize the adverse effects that the freeze will have on large incumbent CCP and PCP carriers like TPI.³⁰ If the Commission acts rapidly, the amount of time during which the freeze will be in effect will be limited and the need for the secondary licensing scheme proposed by the Commission at paragraph 143 of the NPRM will be correspondingly reduced. TPI respectfully submits that the slight advantages that might be obtained by permitting secondary licensing during the (hopefully) brief freeze are far outweighed by the reduction in value of geographic paging licenses and the potential service disruptions that are likely to occur when geographic licensees force incumbent secondary licensees to terminate operations.

V. Application Processing

17. In its NPRM, the Commission proposed to process only

³⁰See paragraph 4, supra.

those pending CCP and PCP applications: (i) that are not MX with other applications as of the adoption date of the NPRM; and (ii) for which the relevant period for filing competing applications has expired as of the adoption date of the NPRM.³¹ As specified with respect to the Commission's freeze on acceptance of new paging applications,³² it is vital that TPI retain the operational flexibility to add, modify and delete paging transmitters as quickly and efficiently as possible. This includes not only the ability to submit new applications for paging facilities, but also the need for prompt Commission action on CCP and PCP applications that TPI currently has pending before the Commission.

18. As with the freeze, TPI recognizes the Commission's need to halt processing of pending paging applications except as specified in the NPRM during the pendency of this proceeding. TPI respectfully submits, however, that the Commission must act as rapidly as possible on the proposals specified in the NPRM so that the adverse effects of further delay in Commission action on paging applications that have already been pending for some time will be minimized. Although TPI anticipates that many of its pending applications will be able to be processed under the standards enunciated at paragraph 144 of the NPRM, if the Commission fails to act on the NPRM for more than a few months, the Commission's continuing failure to act on TPI's pending CCP and PCP paging applications will seriously obstruct TPI's ability to continue its

³¹NPRM at ¶144.

³²See paragraph 4, supra.

explosive growth and system expansion.

19. In addition to these general comments, TPI also respectfully submits the following comments on specific aspects of the Interim Licensing Proposal relating to processing of currently pending paging applications.

A. 931 MHz Reconsideration Proceedings

20. As noted in the NPRM, the Commission adopted new rules for processing 931 MHz CCP licenses in its "Part 22 Rewrite Order."³³ As also noted in the NPRM, the Commission stayed the new 931 MHz licensing rules until the Commission resolved extensive litigation surrounding petitions for reconsideration and applications for review filed with respect to 931 MHz CCP authorizations.³⁴ As part of its Interim Licensing Proposal, the Commission proposed to continue the stay in effectiveness of the new 931 MHz processing rules, process any pending non-MX 931 MHz applications that had been filed as of the adoption date of the NPRM and for which the 60-day filing window for competing applications has already closed.³⁵ The Commission indicated that upon adoption of an order in the above-captioned proceeding, the Commission will process or dismiss all remaining pending applications in accordance with such new rules as are adopted.³⁶

³³NPRM at ¶¶11-12, 145; Report and Order, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994) ("Part 22 Rewrite Order").

³⁴NPRM at ¶143; Order, CC Docket No. 92-115, 10 FCC Rcd 4146 (1995) ("Part 22 Stay Order").

³⁵NPRM at ¶143.

³⁶Id.

21. Although TPI does not oppose the 931 MHz processing procedures specified at paragraph 145 of the NPRM, TPI must emphasize that more than one (1) year has passed since adoption of the Part 22 Stay Order and the Commission has still taken no significant action to resolve the petitions for reconsideration and applications for review regarding 931 MHz applications that originally motivated the Part 22 Stay Order. TPI is particularly sensitive to this issue in that TPI is a party to the one such proceeding surrounding Public Mobile Service Lottery No. PMS-31, for which an application for review has now remained pending for several years.³⁷

22. TPI respectfully submits that before the Commission can properly implement its proposed geographic licensing of 931 MHz CCP Channels, the Commission must first address the outstanding appeals surrounding incumbent systems that have been operating on these channels for several years. Only by acting in cases such as that

³⁷The results of this Commission lottery for 931 MHz CCP channels in the New York metropolitan area have been the subject of extensive litigation ever since the original August 23, 1989, lottery. By Order On Reconsideration, 5 FCC Rcd 7430 (Com.Car.Bur. 1990) ("Recon. Order"), the Commission addressed petitions for reconsideration of the lottery results. The Recon. Order was, however, challenged by several parties and on June 24, 1992, the Chief of the Commission's Mobile Services Division, by Commission Letter 63500-DHS ("June 24 MSD Letter"), adopted a modified frequency assignment plan to settle these appeals. Pursuant to the June 24 MSD Letter, TPI's original authorization for 931.6625 MHz was modified to 931.4875 MHz. In point of fact, TPI is now authorized for an extensive 931.4875 MHz CCP system at numerous locations along the East coast of the United States. Moreover, TPI has recently acquired authorizations for the CCP frequency 931.0875 MHz that were also authorized pursuant to the June 24 MSD Letter. Unfortunately, a petition for reconsideration of the June 24 MSD Letter was timely filed and has remained pending before the Commission for more three (3) years.

surrounding Lottery No. PMS-31 can the Commission provide the finality that all existing incumbents and potential geographic license bidders require to successfully value the geographic licenses and establish bidding strategies to obtain those licenses. Failure by the Commission to act will unnecessarily confuse and complicate the licensing and auction process. Moreover, any action on reconsideration after an auction of geographic licenses that results in a change in the incumbent status of current licensees will almost certainly lead to years of litigation both by affected incumbents and by geographic licensees.

23. TPI appreciates the extremely difficult budgetary constraints under which the Commission is currently operating. TPI also recognizes that resolving the outstanding litigation that resulted in the Part 22 Stay Order may slightly delay adoption of a decision pursuant to the NPRM in the above-captioned proceeding. TPI respectfully submits, however, that the Commission should not proceed to adopt yet another 931 MHz application processing regime without first addressing long-outstanding litigation that could directly affect the status of incumbent systems. Accordingly, TPI requests that the Commission act as rapidly as possible to address these outstanding proceedings before adoption of any rules providing for geographic licensing of 931 MHz CCP Channels.

B. Nationwide Exclusive Applications

24. At paragraph 148 of the NPRM, the Commission stated that:

Under our current PCP exclusivity rules, applicants are granted conditional exclusivity when they are licensed, and permanent exclusivity is awarded when the licensee demonstrates that it has constructed and is operating a

qualified system. As a result, numerous requests for conditional and permanent exclusivity are pending before the Commission. Because of the changes we are proposing to our PCP rules in this proceeding, we believe that consideration of such requests should be postponed while this proceeding is pending. In the event that we adopt our proposals for geographic area licensing, all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot. We therefore will suspend action on all pending exclusivity requests until the conclusion of this rulemaking.

NPRM at ¶148.

25. This portion of the Commission's Interim Licensing Proposal is inconsistent with current rules regarding 929 MHz PCP exclusivity as discussed above.³⁸ Specifically, Section 90.495(c) of the Commission's Rules conveys exclusivity upon initial licensing.³⁹ Although the Commission previously issued the May 27 PN announcing "grandfathered" exclusive licensees, issuance of such a Public Notice relating to "Phase II" exclusive licensees is not a prerequisite to Commission grant of exclusivity. Moreover, although Section 90.495(c) does require that an exclusive licensee timely construct sufficient transmitters to comply with the exclusivity requirements specified at Section 90.495(a), that regulation does not require a separate action by the Commission to grant permanent exclusivity upon completion of the required construction.⁴⁰ Rather, Section 90.495(c) provides only that the exclusivity granted upon initial licensing "will expire" if the

³⁸See paragraphs 9 - 13, supra.

³⁹47 C.F.R. §90.495(c).

⁴⁰Id.

licensee fails to timely construct the required system.⁴¹

26. In light of these facts, it is not clear what "requests for conditional and permanent exclusivity" remain pending before the Commission at this time. For example, as set forth at paragraphs 9 through 13, supra, TPI believes that it has already been granted nationwide exclusivity on PCP frequency 929.2125 MHz subject only to expiration in the extremely unlikely event that TPI does not timely construct the TPI Nationwide System within the extended implementation schedule now authorized by the Commission. It is possible, however, to read the NPRM as providing that because the Commission has not yet issued a Public Notice confirming TPI's nationwide exclusivity, or because TPI has not yet completed construction of the TPI Nationwide System (even though the construction period is still outstanding), TPI's nationwide exclusivity is somehow pending before the Commission and any further action thereon would be postponed pursuant to the Commission's Interim Licensing Proposal.

27. In light of this ambiguity, TPI respectfully submits that the Commission must confirm that entities such as TPI that have already been licensed for Phase II nationwide exclusive systems pursuant to PCIA coordination are not subject to any pending exclusivity requests, the processing of which has been postponed by the Commission's Interim Processing Proposal.

28. TPI must also emphasize that the Commission's statement that, "[i]n the event that we adopt our proposals for geographic

⁴¹Id.

area licensing, all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot" does not make sense in the context of Phase II nationwide PCP exclusivity. Specifically, Phase II entities such as TPI have already obtained nationwide exclusivity on their PCP Channels and no further licensing on such channels can occur at any location throughout the country.⁴² Moreover, like TPI, these entities may still have a significant amount of time available to complete construction of their systems, or at least a sufficient portion of their systems to comply with Section 90.495(a) exclusivity requirements. Accordingly, the Commission's claims that Phase II nationwide exclusive licensees such as TPI will be protected by the incumbent status of only those transmitters licensed as of the February 8, 1996, adoption date of the NPRM is incorrect. In point of fact, there should be no further licensing on channels such as TPI's 929.2125 MHz and these channels should not be subject at all to geographic licensing.⁴³ As the nationwide exclusive licensee on this frequency, TPI must be able to apply for and construct as many additional transmitter sites throughout the country as possible without regard to the Commission's freeze or geographic licensing.

⁴²47 C.F.R. §§90.495(b), 90.495(b)(3).

⁴³As set forth at note 27, supra, TPI intends to submit comments in response to the remainder of the NPRM demonstrating that based on the nationwide exclusivity that has already been granted to TPI and despite the absence of a "Phase II" exclusivity Public Notice like the May 27 PN, TPI's frequency 929.2125 MHz must be considered one of the nationwide frequencies that will be exempt from geographic licensing.